Supreme Court, U.S.
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No. 80-469

IN THE

Supreme Court of the United States

October Term, 1980

KAREN J. SPEIRS and FIRST NATIONAL BANK OF NEVADA, successor Trustee for KAREN J. SPEIRS,

Petitioners,

vs.

BANK OF NEVADA and DIANE CRANDALL COULTHARD, coexecutors of the ESTATE OF GEORGE WILLIAM COULTHARD, Deceased,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Petitioners,

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BANK OF NEVADA and DIANE CRANDALL COULTHARD, coexecutors of the ESTATE OF GEORGE WILLIAM COULTHARD, Deceased,

Respondents.

Questions For Review.

(1) Whether the Supreme Court of the United States has jurisdiction to hear this petition for writ of certiorari when the petitioners failed to present their claim of denial of due process as guaranteed by the Fourteenth Amendment to the Supreme Court of the State of Nevada.

(2) Whether the petitioners waived their right to attempt to disqualify Chief Justice Mowbray of the Supreme Court of the State of Nevada by permitting him to participate in the decisions in three prior related proceedings between the same parties.

(3) Whether the petitioners waived their right to attempt to disqualify Chief Justice Mowbray of the Supreme Court of the State of Nevada by waiting until they had filed a petition for rehearing after the court had rendered its decision adverse to them.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

BANK OF NEVADA, and DIANE CRANDALL COULTHARD, co-executors of the ESTATE OF GEORGE WILLIAM COULTHARD, Deceased, pray that this court deny the petitioners' petition for writ of certiorari.

OPINIONS BELOW.

In addition to the opinions referred to in the petition for writ of certiorari, there are several unreported orders of the Nevada Supreme Court that are pertinent. Those prior orders arose out of related proceedings between the same parties. The unreported order of the Nevada Supreme Court on October 10, 1973, in Case No. 7463, is printed in Appendix A attached hereto, infra, page 1. In that case the Nevada Supreme Court dismissed an appeal brought by the respondents herein from an order of the district court granting leave for petitioners to file a late claim in the ESTATE OF GEORGE WILLIAM COULTHARD.

The second pertinent unreported order was in Case No. 8645, and was dated February 25, 1976. That order denied a writ of mandamus sought by the respondents herein and is printed in Appendix A attached hereto, infra, page 2.

The third pertinent order arose in Case No. 10032, and was entered September 1, 1977. That order is printed in Appendix A attached hereto, infra, page 2. By that order the state supreme court dismissed another appeal that the respondents herein had attempted to bring.

STATUTES INVOLVED.

The case involves the following statutes:

28 U.S.C. §1257 provides in pertinent part as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may

be reviewed by the Supreme Court as follows:

(1) . . . .

(2) . . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

STATEMENT OF THE CASE.

The petitioners were plaintiffs in an action brought in state district court. Respondents, as defendants, were co-executors of the ESTATE OF GEORGE WILLIAM COULTHARD. Respondent DIANE CRANDALL COULTHARD is the widow of GEORGE WILLIAM COULTHARD.

KAREN J. SPEIRS, petitioner herein, was the daughter of MR. COULTHARD. She alleged in state district court that her father was trustee of a testamentary trust established by her mother. Her mother had owned an interest in the Horseshoe Club Hotel and Casino in Las Vegas, Nevada. Upon her death she had bequeathed one-half of her interest to her husband, GEORGE WILLIAM COULTHARD, and one-half to KAREN SPEIRS.

MRS. SPEIRS alleged that her father had invested improperly in diversifying the holdings of the trust. Instead of diversifying, MRS. SPEIRS claimed that he should have

concentrated the trust holdings in one asset, the Horseshoe Club Hotel and Casino.

The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, entered judgment in favor of petitioners on December 29, 1977. Both sides appealed from that determination.

On December 13, 1979, the Supreme Court of the State of Nevada rendered its opinion reversing the trial court and directing judgment in favor of the respondents.

During the period that this case has been pending before the lower court, MRS. COULTHARD and the BANK OF NEVADA brought three separate matters arising out of the lower court litigation before the state supreme court. The first such matter was Case No. 7463. The lower court had permitted the petitioners herein to file a claim in the ESTATE OF GEORGE WILLIAM COULTHARD, even though the time for filing claims had expired. MRS. COULTHARD and BANK OF NEVADA appealed from that decision. On October 10, 1973, the Nevada Supreme Court ruled in favor of petitioners and entered its order dismissing that appeal. Among the justices signing that order was Justice Mowbray.

The next such matter was a petition for mandamus. MRS. COULTHARD and BANK OF NEVADA had moved for summary judgment in the lower court. When that court denied their motion, they petitioned the Supreme Court of the State of Nevada for a writ of mandamus directing the lower court to enter summary judgment in their favor. On February 25, 1976, in Case No. 8645, the Nevada Supreme Court ruled in favor of the petitioners and entered its order denying the petition for writ of mandamus. Once again, Justice Mowbray was one of the justices signing that order.

The third such matter occurred when MRS. COULTHARD and BANK OF NEVADA sought to appeal from the written decision entered by the lower court following the trial of this matter. In that case, Case No. 10032, MRS. SPEIRS and FIRST NATIONAL BANK moved to dismiss the appeal alleging that final judgment had not yet been entered. The Nevada Supreme Court again ruled in favor of the petitioners on September 1, 1977, and entered its order dismissing appeal. Among the justices signing that order was Justice Mowbray.

The three appellate matters that arose pending the litigation in the lower court had several common features. Justice Mowbray was sitting at the time of each such matter, and signed the decision or order in each instance. Each such decision was favorable to the petitioners herein. Finally, petitioners made no attempt to disqualify Justice Mowbray in any of those matters.

Petitioners made no attempt to disqualify Justice Mowbray until after the Supreme Court of the State of Nevada had entered its decision reversing the lower court on December 13, 1979. Petitioners filed a petition for rehearing on December 27, 1979. They coupled that petition with a motion to disqualify Chief Justice Mowbray.

In support of their motion to disqualify, MRS. SPEIRS and FIRST NATIONAL BANK submitted two affidavits, one from MRS. SPEIRS (now known as MRS. TADSEN), and one from Elsie Hussey. In her affidavit, MRS. TADSEN alleged that Justice Mowbray officiated at her wedding ceremony; that her father, G. WILLIAM COULTHARD, informed her that Justice Mowbray was a good friend of his; and that Justice Mowbray attended either a Christmas party or New Years party at COULTHARD'S home in 1970.

Mrs. Hussey alleged in her affidavit that she was COULTHARD'S secretary; that COULTHARD and Justice Mowbray had a "warm, close" friendship; that Justice Mowbray (apparently then a district judge) was the recipient of Christmas presents that COULTHARD customarily delivered to the judges and courthouse personnel; that she "assumed" that COULTHARD and Justice Mowbray "saw each other socially"; and that COULTHARD was also friendly with Justice Thompson.

The respondents opposed the rehearing, and filed a motion to strike the affidavits of MRS. SPEIRS and Mrs. Hussey. On June 4, 1980, the Nevada Supreme Court entered an order denying the petition for rehearing with Chief Justice Mowbray voluntarily declining to participate. That order is attached at page 8 of the appendix to the petition for writ of certiorari.

The petitioners on June 11, 1980, filed a second petition for rehearing claiming that Chief Justice Mowbray had voluntarily disqualified himself and that a district judge was required to be appointed pursuant to Nevada law to sit in place of the Chief Justice. MRS. COULTHARD and BANK OF NEVADA opposed the second petition on the basis that the Chief Justice did not disqualify himself but simply declined to participate, and that three of the five members of the court had found no merit in the first petition for rehearing. On July 3, 1980, the Nevada Supreme Court denied the second petition for rehearing.

SUMMARY OF ARGUMENT.

Under statutory and case law governing the granting of writs of certiorari, the petitioners are required to establish that they set up their claim of a deprivation of their constitutional rights before the Nevada Supreme Court. They did not do so. Thus, that court was never given the oppor-

tunity to determine the claim that the petitioners present here. Accordingly, this court is without jurisdiction to consider the petition for writ of certiorari.

Furthermore, the petitioners waived their right to attempt to disqualify Chief Justice Mowbray of the Nevada Supreme Court. The petitioners were aware, as early as 1970, that Justice Mowbray was a member of the Nevada Supreme Court. While this matter was pending in the trial court, there were three appellate proceedings brought before the Nevada Supreme Court in 1973, 1976 and 1977. Each of those matters was resolved in favor of the petitioners herein. Justice Mowbray was one of the justices determining each of those matters. The petitioners made no attempt to disqualify the Chief Justice until 1979 after the court had rendered its majority opinion reversing the final judgment of the lower court. By delaying their disqualification attempt until they had filed a petition for rehearing, the petitioners waived any right to disqualify Chief Justice Mowbray for bias or prejudice.

The petitioners' position is based upon the assumption that the Chief Justice voluntarily disqualified himself. However, the orders in this case that were part of the appendix to the petition, reflect instead that the Chief Justice simply declined to participate in the determination of the first petition for rehearing. There was no disqualification nor any basis for disqualification.

ARGUMENT.

I.

The Supreme Court of the United States Does Not Have Jurisdiction to Consider the Petitioners' Petition for Writ of Certiorari Because They Failed to Present the Claim That Their Federal Constitutional Rights Have Been Violated to the Supreme Court of the State of Nevada.

Petitioners base their petition upon 28 U.S.C. §1257 (3). Petitioners claim that Chief Justice Mowbray voluntarily disqualified himself from sitting on their petition for a rehearing. Accordingly, petitioners claim that another judge should have been appointed under state law to sit in place of the Chief Justice. Failure of such an appointment supposedly deprived petitioners of their due process rights under the Fourteenth Amendment to the United States Constitution.

28 U.S.C. §1257 provides in pertinent part as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) . . . .
>
> (2) . . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.
>
> For the purposes of this section, the term "highest

court of a State" includes the District of Columbia Court of Appeals.

The language of this provision requires that the federal constitutional question be "specially set up or claimed." This court has established the principle long ago that it will refuse to consider federal constitutional issues raised for the first time on review of decisions of a state court. *Cardinale v. State of Louisiana*, 394 U.S. 437, 438, 89 S. Ct. 1161, 1162 (1969).

The burden is on the petitioners to show that a federal constitutional issue was presented to the state supreme court. Otherwise, this court will presume that the state appellate court failed to pass upon the federal question because it was not properly presented. *Fuller v. State of Oregon*, 417 U.S. 40, 50 n. 11, 94 S. Ct. 2116, 2123 n. 11 (1974).

Petitioners never raised their claimed constitutional deprivation in the Supreme Court of the State of Nevada. Their allegation that the action of the state supreme court violated their due process rights under the Fourteenth Amendment of the United States Constitution surfaced for the first time in their petition for a writ of certiorari.

At page 6 of their petition, petitioners repeat their arguments presented to the state supreme court. Those arguments were based only on the Constitution of the State of Nevada and statutory law enacted by the state. Accordingly, the Nevada Supreme Court was never presented with the federal question that petitioners seek to raise here.

Petitioners failed to specially set up or claim a deprivation of their due process rights under the Fourteenth Amendment before the Supreme Court of the State of Nevada, as required by 12 U.S.C. §1257. Accordingly, this court does not have jurisdiction to consider that claim. The petition for writ of certiorari should be denied.

II.

Petitioners Waived Their Right to Disqualify Chief Justice Mowbray by Waiting to Assert Their Grounds for Disqualification Until After the Nevada Supreme Court Had Rendered Its Decision Adversely to Them.

In her affidavit MRS. SPEIRS stated that Justice Mowbray had presided at her 1970 wedding. Thus she was aware in 1970 of his judicial position. Furthermore, Justice Mowbray participated in three appellate matters that arose prior to the lower court's decision in this matter. In each of those appeals, decided in 1973, 1976 and 1977, the Nevada Supreme Court ruled in favor of the petitioners herein. Those appeals arose long after MRS. SPEIRS' wedding in 1970. Nevertheless, no attempt was made to disqualify Chief Justice Mowbray until after the Nevada Supreme Court had rendered its decision reversing the lower court and ruling adversely to MRS. SPEIRS and FIRST NATIONAL BANK in 1979. MRS. SPEIRS and the BANK then filed their petition for rehearing and at that point first raised the disqualification of Chief Justice Mowbray.

Parties may waive the disqualification of a judge. For example, in *State ex rel Warren v. District Court,* 57 Nev. 214, 61 P. 2d 6 (1936), upon different facts from the case at bar, the Nevada Supreme Court held that a party had waived his right to disqualify a trial judge. In *Kiselman v. Rautzahn,* 68 Nev. 342, 232 P. 2d 1008 (1951), the court held that an objection to a trial judge must be made prior to trial.

Other courts have recognized that a disqualification must be voiced immediately or it may be waived. For example, in *Aaberg v. District Court,* 319 P. 2d 491, at 494 (Colo. 1957), the court held as follows:

> From the record before us, we observe that the first motion to disqualify was filed fifteen months after the action was commenced. Though Rule 97 does not fix the time when a motion should be filed, good faith and orderly process dictate that if grounds for disqualification are known at the time the suit is filed and a party desires to proceed thereon, a motion to disqualify should be filed prior to taking any other steps in the case. *Failure to promptly assert known grounds of disqualification or exercise of due diligence may well constitute a waiver thereof.*
> (Emphasis added).

To similar effect, the court in *Shakin v. Board of Medical Examiners*, 62 Cal. Rptr. 274, at 285 (Cal. App., 1967), held as follows:

> It is obvious that timeliness is extremely important, . . . In other words, it would create an intolerable situation to permit an attorney or a party who knew, or claimed to know of disqualifying facts, deliberately to withhold the making of a disqualification statement until he knew that the filing of such a statement would disrupt the orderly processes of a court. Too, if disqualification is not urged at the earliest practicable opportunity, there is a waiver of such alleged disqualification.

In the present case, the movants should have attempted their disqualification prior to Justice Mowbray's considering any appellate matters and certainly before the argument of this case. They have waived any right to disqualify him by waiting to file their motion until after the opinion was rendered.

The case of *State v. Turnbow*, 195 P. 569 (Or. 1921) is directly in point. In that case, one of the litigants attempted to disqualify an appellate judge. However, the party waited until filing a petition for rehearing before objecting to the

particular justice. The Supreme Court of Oregon rejected the disqualification and held that in order to be effective any objection should have been made at the time of argument. Disqualification could not be raised for the first time on a petition for rehearing.

III.

The Cases Cited by the Petitioners Are Not in Point.

The petitioners cite two cases from the State of Nevada, *Frevert v. Swife*, 19 Nev. 363 (1886), and *Hoff v. Eighth Judicial District Court of the State of Nevada*, 79 Nev. 108, 378 P. 2d 977 (1963). Both of those cases involve judges who were disqualified from hearing a cause because of bias or prejudice. In the present case, however, the petitioners have not shown any bias or prejudice on the part of Chief Justice Mowbray. The Chief Justice was not subject to any of the statutory disqualifications of the State of Nevada. All that the petitioners showed was that Chief Justice Mowbray was to some extent acquainted with the deceased, GEORGE WILLIAM COULTHARD.

Another case relied upon by MRS. SPEIRS and FIRST NATIONAL BANK OF NEVADA is a case from New Hampshire, *Rollins v. Connor*, 69 A. 777 (N.H. 1908). In that case, two men were candidates for election to the city council in Nashua, New Hampshire. The plaintiff received more votes than his competitor. However, the moderator of the town meeting declared the latter elected. When the plaintiff appealed that decision to the city council, his competitor was permitted to take office and vote on the plaintiff's petition. The Supreme Court of New Hampshire held for the plaintiff in pertinent part as follows:

> It is equally plain that a man cannot sit in judgment to decide upon the validity of a claim against himself, or in a proceeding in which he is the defendant. The

> first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality. He cannot be judge and party, arbiter and advocate, in the same cause. (Ibid at 778). (Quotation marks and citations omitted).

In that case, one party held the position of being permitted to sit on a city council and rule on his opponent's petition. Thus, he was in the unusual position of being a party litigant and a judge at the same time. That case is unique and is totally different from the situation here. Furthermore, in that case the plaintiff had no opportunity to object to such procedure. In the present case, MRS. SPEIRS and FIRST NATIONAL BANK had many opportunities to object to Chief Justice Mowbray. They waited until the final decision had been rendered against them, however, before advancing their claimed disqualification.

The case of *In Re Murchison*, 349 U.S. 133, 75 S.Ct. 623 (1955), cited by the petitioners, is likewise not in point. That case held that no man could judge his own case or be permitted to judge cases in which he had an interest in the outcome. There is not even the hint that Chief Justice Mowbray had interest in the present case. Accordingly, that case is not in point.

Conclusion.

For the foregoing reasons the court should deny the petition for a writ of certiorari.

Respectfully submitted,

JOHN PETER LEE, LTD.,

By JAMES C. MAHAN, ESQ.,

Attorneys for Respondents.

APPENDIX A.

Order Dismissing Appeal.

In the Supreme Court of the State of Nevada.

Bank of Nevada and Diane Crandall Coulthard, Co-Executors of the Estate of George William Coulthard, a/k/a G. William Coulthard, Deceased, Appellants, vs. First National Bank of Nevada, Successor Trustee for Karen J. Speirs formerly known as Karen J. Coulthard, Respondent. No. 7463.

Filed: Oct. 10, 1979.

This matter is before us on respondent's motion to dismiss the appeal.

The record reflects that the trial court granted respondent's motion to file a late claim against the Estate of G. William Coulthard, deceased; this is an attempted appeal from that order.

An order granting a motion to file a late claim is not appealable. NRS 155.190; NRAP 3A(b); Ontjes v. McNider, 275 N.W. 328 (Iowa 1937); In re Benesch's Estate, 240 N.W. 127 (Wis. 1932); In re Golden's Estate, 231 N.W. 833 (Neb. 1930). See O'Neill v. Dunn, 83 Nev. 228, 427 P.2d 647 (1967). We grant respondent's motion and dismiss the appeal.

It is so ORDERED.

/s/ MOWBRAY, C. J.
/s/ BATJER, J.
/s/ [Illegible], J.

cc: Hon. Leonard Gang, District Judge
Wiener, Goldwater & Galatz, Ltd.
Messrs. Lee and Beasey
Loretta Bowman, Clerk.

Order Denying Petition
For Writ of Mandamus.

In the Supreme Court of the State of Nevada.

Bank of Nevada and Diane Crandall Coulthard, Co-Executors of the Estate of G. William Coulthard, Deceased, Petitioners, vs. The Honorable Michael Wendell, Judge of the Eighth Judicial District Court of the State of Nevada, Karen J. Speirs and First National Bank of Nevada, Successor Trustee for Karen J. Speirs, Respondents. No. 8645.

Filed: Feb. 25, 1976.

The court having considered the petition on file herein, and not being satisfied that this court's intervention at this time by way of extraordinary writ is warranted, said petition is denied. NRAP 21(b). Cf. NRAP 21(a); Turner v. Fogg, 39 Nev. 406, 159 P. 56 (1916).

It is so ORDERED.

/s/ GUNDERSON, C. J.
/s/ BATJER, J.
/s/ MOWBRAY, J.

cc: Hon. Michael Wendell, District Judge
Messrs. Wiener, Goldwater & Waldman
John Peter Lee, Esq.
James C. Mahan, Esq.
Loretta Bowman, Clerk.

Order Dismissing Appeal.

In the Supreme Court of the State of Nevada.

Bank of Nevada and Diane Crandall Coulthard, Co-Executors of the Estate of G. William Coulthard, Deceased, Appellants, vs. First National Bank of Nevada, successor Trustee for Karen J. Speirs, formerly known as Karen J. Coulthard, and Karen J. Speirs, Respondents. No. 10032.

Filed: Sept. 1, 1977.

Respondents have moved to dismiss this appeal contending the order from which the appeal is taken is neither a final judgment nor an interlocutory order from which an appeal is authorized. We agree.

A final judgment is one which disposes of the issue, determines costs, and leaves nothing for future consideration of the court. O'Neill v. Dunn, 83 Nev. 228, 427 P.2d 647 (1967). Here, the case was explicitly retained in the district court for further "findings and recommendations."

Neither is the order, as appellants suggest, an interlocutory judgment in an action for partition. It is an action to require the trustee to disgorge property purchased in breach of his fiduciary duties. It cannot be dubbed an action for partition without doing violence to the long standing rule that the right to appeal is fixed by statute and there can be no appeal except as provided therein. Johns-Manville, Inc. v. Lander County, 48 Nev. 244, 229 P. 387 (1924).

Accordingly, we grant respondents' motion to dismiss, without prejudice to appellants' right to appeal after completion of the action below.

Respondents' motion for costs is denied.

It is so ORDERED.

/s/ BATJER, C. J.
Batjer

/s/ MOWBRAY, J.
Mowbray

/s/ THOMPSON, J.
Thompson

/s/ GUNDERSON, J.
Gunderson

/s/ MANOUKIAN, J.
Manoukian

cc: Hon. Michael J. Wendell, District Judge
John Peter Lee, Esq.
James C. Mahan, Esq.
Wiener, Goldwater & Waldman, Esqs.
Gerald M. Gordon, Esq.
Loretta Bowman, Clerk